



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 215, 217, and 243**

**[Docket DARS-2016-0026]**

**RIN 0750-AI99**

**Defense Federal Acquisition Regulation Supplement:**

**Undefinited Contract Action Definitization (DFARS Case 2015-D024)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action on allowable profit.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Gomersall, telephone 571-372-6176.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the Federal Register at 81 FR 73007 on October 21, 2016, to amend the DFARS to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action (UCA), and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. In some cases, DoD contracting personnel have not documented their consideration of the reduced risk to the contractor of costs incurred during the undefinitized period of a UCA. While such costs generally present very little risk to the contractor, the contracting officer should consider the reasons for any delays in definitization in making their determination of the appropriate assigned value for contract type risk.

## **II. Discussion and Analysis**

Two respondents submitted public comments in response to the proposed rule. DoD reviewed the public comments in the development of this final rule. An analysis of the comments is provided as follows:

### **A. Summary of Significant Changes.**

The following changes were made to the language published in the proposed rule:

1. The term "auditable proposal" in 215.404-71-2 is revised as "qualifying proposal as defined in 217.7401(c)" for consistency with 10 U.S.C. 2326.
2. The instructions for completing blocks 24a and 24b have been revised for clarity.
3. The language at 215.404-71-3(d) (2) (ii) is revised for clarity.

#### B. Analysis of Public Comments

##### 1. Weighted Guidelines Revision.

Comment: One respondent did not see the need to change the current weighted guidelines form and structure to address unique requirements associated with establishing profit objectives for undefinitized contract actions, and therefore recommended no change to the current weighted guidelines application. The respondent asserted that the Government should comply with guidance provided by USD/AT&L, and the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, which stipulates that allowable profit should reflect the cost risk at the time that a contractor submits a qualifying proposal. The respondent stated that contractors should not be penalized for positive and efficient performance because they agreed to start work before final agreement on price, particularly when Government action or inaction is the cause of the delay. The respondent therefore asserted that profit should be based upon

the risk at the time of the proposal and not at the time of negotiation.

Response: The stated purpose of this rule is to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of a UCA, and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. Therefore, the weighted guidelines form is revised to provide a means of clearly demonstrating that the contracting officer has appropriately considered and documented the risk to the contractor during the undefinitized period, as well as the contractor's due diligence in submitting a timely, auditable proposal. DFARS case 2017-D022 has been opened to implement section 811, Modified Restrictions on Undefinitized Contractual Actions, of the NDAA for FY 2017.

## 2. Costs Incurred Prior to Definitization.

Comment: One respondent stated that the requirements of DFARS 215.404-71-3(d) (2), which direct contracting officers to assess the extent to which costs have been incurred prior to definitization of the UCA, are inconsistent with the tenets of the NDAA for FY 2017 and should also be deleted.

Response: The requirements of DFARS 215.404-71-3(d)(2) are consistent with the requirements of section 811 of the NDAA for FY 2017, which are being implemented under DFARS case 2017-D022.

3. Management/Cost Control Weighted Guidelines Factor Adjustment.

Comment: One respondent expressed concern that the 1 percent adjustment to the management/cost control factor is tied to the contractor's timely submission of an auditable proposal. The respondent stated that in many cases, industry submits timely, auditable proposals only to have the Government, usually after lengthy delay, deem them insufficient and request an updated proposal. This becomes an endless loop of auditing, requests for updated information (including actuals), more auditing, more requests for updated information, etc.

Response: The adjustment to the management/cost control factor in the weighted guidelines is established to allow contracting officers to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. It is incumbent on contractors to provide timely, auditable proposals in order to demonstrate their efficient management and internal cost control systems.

4. Timely UCA Definitization.

Comment: Both respondents expressed concern that the rule does not address the need for the Government to definitize UCAs in a timely manner.

Response: To provide for enhanced management and oversight of UCAs, departments and agencies prepare and maintain semiannual Consolidated UCA Management Plans and UCA Management Reports to ensure contracting officers are actively and efficiently pursuing definitization of UCAs. Likewise, contractors are expected to submit timely, auditable proposals, including adequate supporting data in order to avoid unnecessary delays.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-shelf (COTS) Items**

This rule amends the DFARS to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action on allowable profit. The revisions do not add any new burdens or impact applicability of clauses and provisions at or below the simplified acquisition threshold, or to commercial items.

### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **V. Executive Order 13771**

This rule is not an E.O. 13771, Reducing and Controlling Regulatory Costs, regulatory action, because this rule is not significant under E.O. 12866.

#### **VI. Regulatory Flexibility Act**

This rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

The objective of the rule is to gain visibility into the contracting officer's rationale for the contract type risk values entered on the DD Form 1547, Record of Weighted Guidelines Application. The rule requires contracting officers to document in the price negotiation memorandum their rationale for assigning a specific contract type risk value. In addition, Item 24 on the DD Form 1547 is separated into Item 24a, Contract

Type Risk (based on contractor incurred costs under a UCA) and Item 24b, Contract Type Risk (based on Government projected costs).

This rule will not have a significant economic impact on a substantial number of small entities. This rule only changes processes that are internal to the Government by providing a more transparent means of documenting the impact of costs incurred during the undefinitized period of a UCA when calculating negotiation profit objectives. This rule does not revise the current regulatory requirements at DFARS 215.404-71-3(d)(2), which direct contracting officers to assess the extent to which costs have been incurred prior to definitization of the contract action. However, to recognize when contractors demonstrate efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.

There is no change to reporting or recordkeeping as a result of this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules.



There are no known significant alternative approaches to the rule that would meet the requirements. DoD considers the approach described in the proposed rule to be the most practical and beneficial for both Government and industry.

## **VII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### **List of Subjects in 48 CFR Parts 215, 217, and 243**

Government procurement.

**Amy G. Williams,**

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 217, and 243 are amended as follows:

1. The authority citation for 48 CFR parts 215, 217, and 243 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

#### **PART 215—CONTRACTING BY NEGOTIATION**

2. Amend section 215.404-71-2 by adding paragraph (e)(2)(iii) to read as follows:

**215.404-71-2 Performance risk.**

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(iii) If the contractor demonstrates efficient management and cost control through the submittal of a timely, qualifying proposal (as defined in 217.7401(c)) in furtherance of definitization of an undefinitized contract action, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.

\* \* \* \* \*

3. Amend section 215.404-71-3 by revising paragraphs (b) introductory text, (b)(1) through (3), and (d)(2) to read as follows:

**215.404-71-3 Contract type risk and working capital adjustment.**

\* \* \* \* \*

(b) Determination. The following extract from the DD 1547 is annotated to explain the process.

Item	Contractor Risk Factors	Assigned Value	Base	Profit Objective
24a	Contract Type Risk (based on incurred costs at the time of qualifying proposal submission)	(1)	(2) (i)	(3)
24b	Contract Type Risk (based on Government estimated cost to complete)	(1)	(2) (ii)	(3)
24c	Totals		(3)	(3)

Item	Contractor Risk Factors	Costs Financed	Length Factor	Interest Rate	Profit Objective
25	Working Capital (4)	(5)	(6)	(7)	(8)

(1) Select a value from the list of contract types in paragraph (c) of this section using the evaluation criteria in paragraph (d) of this section. See paragraph (d) (2) of this section.

(2) (i) Insert the amount of costs incurred as of the date the contractor submits a qualifying proposal, such as under an undefinitized contract action, (excluding facilities capital cost of money) into the Block 24a column titled Base.

(ii) Insert the amount of Government estimated cost to complete (excluding facilities capital cost of money) into the Block 24b column titled Base.

(3) Multiply (1) by (2)(i) and (2)(ii), respectively for Blocks 24a and 24b. Add Blocks 24a and 24b and insert the totals in Block 24c.

\* \* \* \* \*

(d) \* \* \*

(2) Mandatory. (i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404-6(a) and 243.204-70-6).

When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type.

(ii) Contracting officers shall document in the price negotiation memorandum the reason for assigning a specific contract type risk value, to include the extent to which any reduced cost risk during the undefinitized period of performance was considered, in determining the negotiation objective.

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## **PART 217—SPECIAL CONTRACTING METHODS**

### **217.7404-6 [Amended]**

4. Amend section 217.7404-6 by—

a. In paragraph (b), removing “The contractor’s reduced cost risk for costs incurred” and adding in its place “Any reduced cost risk

to the contractor for costs expected to be incurred" in its place;  
and

b. In paragraph (c), removing "contract file" and adding "price negotiation memorandum" in its place.

#### **PART 243—CONTRACT MODIFICATIONS**

##### **243.204-70-6 [Amended]**

5. Amend section 243.204-70-6 by—

a. In paragraph (b), removing "The contractor's reduced cost risk for costs incurred" and adding "Any reduced cost risk to the contractor for costs expected to be incurred" in its place; and

b. In paragraph (c), removing "contract action" and adding "unpriced change order" in its place and removing "contract file" and adding "price negotiation memorandum" in its place.

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